86-93

NO. 86-

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CASSANDRA M. MENOKEN,
PETITIONER,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASSANDRA M. MENOKEN
Attorney at Law and
Pro Se Petitioner

215 Seaton Pl., N.E.
Washington, D.C. 20002
(202) 269-3465

QUESTIONS PRESENTED

This is an action challenging the termination of a federal employee. The termination was the direct result of a 1981 reduction in force which was improperly implemented by the Department of Health and Human Services (the Department). The reduction in force was initiated in connection with the transfer of functions from the Community Services Administration (CSA) to the Office of Community Services (OCS), which is an operating division within the Department. Both the Merit Systems Protection Board (the Board) and the United States Court of Appeals for the Federal Circuit found, as a matter of fact and law, that the Department's 1981 reduction in force failed to comply with controlling regulations. Nevertheless, despite the showing

of specific harm to the substantive rights of the petitioner, both the Board and the Court of Appeals upheld her termination. Indeed, the Court of Appeals went further by explicitly sanctioning the legally deficient procedure by which the petitioner and numerous other employees were terminated by the Department in 1981. It is in this context that the following questions are presented:

1. Whether the Court of Appeals erred in its failure to require the Department to properly determine petitioner's retention rights.

2. Whether the Court of Appeals erred in sanctioning an Executive Branch agency's failure to comply with regulations governing the implementation of a reduction in force.

3. Whether an Executive Branch agency violates 5 U.S.C. § 3503(a) when it terminates an employee with transfer rights and assigns that employee's duties to individuals with no transfer rights.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties in the proceeding below.

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DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petitioner, Cassandra M. Menoken, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit entered on February 18, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 784 F.2d 365 and is attached hereto as Appendix (App.) A. The decision of the Merit Systems Protection Board, from which review by the Court of Appeals was sought, is unreported and attached hereto as App. B.

RELATED PROCEEDINGS

The issues raised in this petition overlap with issues raised and decided in the related case of Certain Former CSA Employees v. Department of Health and Human Services. The Court of Appeals opinion in that case is reported at 762 F.2d 978 and is attached hereto as App. C. The decision reviewed by the Court of Appeals in that case was rendered by the Merit Systems Protection Board. The opinion of the Mer-

it Systems Protection Board is reported at 21 M.S.P.R. 379 (1984) and is attached hereto as App. D.

JURISDICTION

The Court below issued a decision on February 18, 1986. App. A. On April 11, 1986 the Court denied a timely petition for rehearing. App. E. On April 28, 1986 the Court denied a timely suggestion for rehearing en banc. App. F. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED *

1. 5 U.S.C. § 3503(a)(1982):

> When a function is transferred from one agency to another each competing employee employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

---

* Denotes a rule that is cited here only because it is inexplicably relied upon by the Court of Appeals.

2. 5 C.F.R. § 351.302(a) (1981):

> Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

3. 5 C.F.R. § 302(c) (1981)*:

> Regardless of an employee's personal preference, an employee has no right to transfer with his or her function unless the alternative in the competitive area losing the function is separation or demotion.'

4. 5 C.F.R. § 351.303(e)(2) (1981):

> If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area that is gaining the function, the losing competitive area should give preference to volunteers with the highest retention standing.

5. 5 C.F.R. § 351.601(b) provides:

> An agency may not release a competing employee from a competi-

tive level while retaining in that level an employee with lower retention standing.

6. 5 C.F.R. § 351.703 (1981)*:

(a) An agency shall assign under § 351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction in representative rate when a position in the other competitive level is held by an employee:

(1) In a lower subgroup or
(2) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be deter-

mined on the basis of the new pay rates.

STATEMENT OF THE CASE

Petitioner was involuntarily separated from the Community Services Administration (CSA) on September 30, 1981 and not accepted for transfer to the Department of Health and Human Services (Department). The factual background leading up to the dissolution of CSA and the transfer of that agency's functions to the Department is undisputed and adequately set forth in a decision of the Court of Appeals in a related matter, Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985). App. C. In that decision, the Court of Appeals affirmed a June 18, 1984 Opinion and Order of the Merit Systems Protection Board (Board) which found that

the Department was "remiss" in its duty to conduct a reduction in force, in connection with the transfer of functions, in a manner consistent with governing regulations found at 5 C.F.R. Part 351. Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984). App. D. The Court of Appeals also upheld the mechanism established by the Board to determine whether the substantive rights of any former CSA employees had been adversely affected by the Department's illegal implementation of the reduction in force. It was pursuant to that mechanism that a hearing was held regarding petitioner's individual appeal of her termination. In that hearing the following facts were established through undisputed evidence:

1. That petitioner, while an employee at CSA, performed duties and responsibilities identified with functions which transferred to the Department. Stipulation 24a;

2. That despite petitioner's rights under 5 U.S.C. § 3503(a), the Department failed to accept petitioner for employment when her functions transferred;

3. That petitioner was qualified to perform all of the attorney positions established in the Department's Office of Community Services (OCS) Trans. 19;

4. That the Department accepted for transfer at least one former CSA employee whose retention rights were inferior to that of the petitioner Trans. 21-22;

5. That the Department abolished petitioner's position at CSA and assigned her former duties and responsibilities to individuals who were not former CSA employees Trans. 22-23;

Despite the evidence establishing the foregoing facts the Board affirmed petitioner's termination. The Board made no attempt to ascertain what petitioner's

retention standing would have been if the Department had implemented the reduction in force in accordanc with controlling regulations found at 5 C.F.R. Part 351. In affirming petitioner's termination the Board cited as authority, 5 C.F.R. §§ 302 (c) and 703. The referenced regulations have no relevance to any issue raised by the petitioner's appeal. The petitioner sought review in the United States Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. § 7703. The Court of Appeals upheld the Board's misreliance on 5 C.F.R. § 351.302(c) and 703, but failed to explain how or why the referenced regulations are pertinent to the issue of whether the petitioner would have survived a properly implemented re-

duction in force. Indeed, the Court of Appeals went further and explicitly sanctioned the legally deficient procedure by which petitioner and numerous other CSA employees were terminated. See App. A-18.

The Department Violated Petitioner's Rights Under 5 U.S.C. § 3503 (a)

Section 3503(a) of Title V of the United States Code provides:

> When a function is transferred from one agency to another each competency employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

It is therefore clear that in 1981, when the Department assumed the functions of CSA, it was under a statutory duty to appoint former CSA employees, who were associated with the transferred functions, to positions for which they qualified before appointing any non CSA employee to such positions. It is undisputed that all CSA employees, including petitioner, were associated with transferred functions in 1981. It is also undisputed that the Department terminated petitioner as a result of the transfer, while it assigned her duties to at least two identified individuals from the Department of Justice

(DOJ), and numerous other unidentified individuals in the Department's Office of General Counsel. Trans. 50. Such maneuvering strikes at the very heart of 5 U.S.C. § 3503(a), the primary purpose of which is to "protect employees in the transferring agency from being 'squeezed out' in the wake of a transfer of function." Ross v. United States, 566 F. Supp. 1024, 1027 (D.D.C.1984). Not only did the Department effectively "squeeze" petitioner out of her position by assigning her duties to non CSA employees, as the following discussion demonstrates, the Department also ignored petitioner's retention rights relative to that of other CSA employees.

The Department Violated Petitioner's Rights Under 5 C.F.R. Part 351.

Regulations found at 5 C.F.R. § 351.303(e)(2) provide:

> If the total number of employees who volunteer for transfer exceeds the total number of employees required to perform the function in the competitive area gaining the function, the losing competitive area should give preference to volunteers with the highest retention standing.

In the instant matter, CSA (the losing competitive area) made no effort at all to ascertain the relative retention standing of CSA employees who sought to be transferred to the Department (the gaining competitive area). CSA merely terminated all employees on September 30, 1981. It was subsequent to that date that the Department, pursuant to a district court order, finally undertook to appoint former CSA employees to positions in OCS. However, as previously pointed out, the Department's efforts in that regard failed to comply with the requirements of 5

C.F.R. Part 351. For example the Court of Appeals, in a related matter, found:

> [The Preference Order Master Lists] did not satisfy the requirements of traditional reduction in force registers since they did not show the competitive levels of each employee . . . and there were no separate retention registers for each competitive level.
>
> Accordingly, there may have been some former Community Services Administration employees who were not given jobs with the Office of Community Services to which they would have been entitled if the Community Services Administration had conducted a proper reduction in force.
>
> The remand procedure that the Board adopted in this case is designed to enable individual employees who are in that position to obtain the jobs that they should have obtained.

Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978, 984 (Fed. Cir. 1985). At petitioner's

individual hearing before the Board, the Department made no effort to rectify its failure to establish proper competitive levels. The evidence nevertheless establishes that the GS-14 attorney positions and the GS-15 attorney positions in OCS should have been classified at the same competitive level because there was no meaningful difference between the two positions other than the grade. 5 C.F.R. § 351.405; Appellant's Exhibits 3, 4, 5 and 6. The evidence further establishes that petitioner was qualified for all of the attorney positions in OCS, irrespective of the grade levels assigned to such positions. It is significant that the Department never disputed petitioner's qualifications in that regard. The grade level assigned to each attorney appointed to OCS was merely reflective of the grade

level held by that individual prior to the reduction in force. Indeed, the Department's own witness acknowledged that it was possible that those individuals were actually working in OCS before the Department even prepared position descriptions for them. Trans. 65. It is therefore clear that the fact that petitioner was classified as a GS-14, prior to the reduction in force, did not, as held by the Court of Appeals, automatically render her unqualified for an attorney position in OCS.

The record reflects that the Department did not dispute the fact that it appointed a tenure group IIB employee to an attorney position in OCS. Petitioner is a tenure group IB employee. It is well established that the retention rights of a tenure group IIB employee are infer-

ior to that of a tenure group IB employee. 5 C.F.R. § 351.501(a)(1) and 502. The Department's retention therefore of one John Meyers, over the petitioner, demonstrated a blatant disregard of petitioner's rights as established by 5 C.F.R. § 351.601(b) which provides:

> An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing.

There can be no question that, given the foregoing irregularities, the Department, at the very least, had a duty to prove, by a preponderance of the evidence, that the petitioner would not have survived a properly implemented reduction in force. Hill v. Department of Commerce, 1984 FMSR ¶84 6086 (MSPB December 11, 1984); Losure v. ICC, 2 MSPB 361 (1980). The Department, however, made absolutely

no effort in that regard. Such failure was improperly sanctioned by the Court of Appeals through its explicit "approval" of the Department's legally deficient reduction in force procedure. App. A-18-19.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals is Inconsistent with an Applicable Decision of this Court

The primary reason that the Court should grant this petition is to require the Court of Appeals to follow the principles enunciated in this Court's decision in the case of Vitarelli v. Seaton 359 U.S. 535 (1959). A brief review of the facts and holding in Vitarelli, will reveal the clear nature of the error committed by the Court of Appeals in the case at bar.

Mr. Vitarelli was an employee of the Interior Department. The Secretary of the

Interior undertook to terminate him on grounds of national security. However, in so doing there was a failure to comply with regulations governing the termination of employees on such grounds. Finding Mr. Vitarelli's termination procedurally defective, this Court held the termination to be null and void and ordered reinstatement and backpay. The Court reasoned:

> Since ... the Secretary [of Interior] gratuitously decided to give a reason [for Vitarell's discharge], and that reason was national security, he was obligated to conform to the procedural standards he had formulated ... for the dismissal of employees on security grounds.

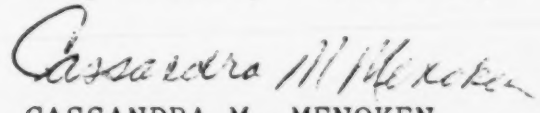
The reasoning and result in Vitarelli clearly apply to the facts in this case. Just like Mr. Vitarelli, petitioner and approximately 900 other CSA employees, were terminated pursuant to a procedure which fell substantially short of what was

required by applicable regulations. Arguably, the Court of Appeals, upon finding the Department remiss in its duty to conduct a properly implemented reduction in force, could have and indeed should have, ordered reinstatement and backpay to all CSA employees who were illegally terminated. Therefore, there can be no question that the Court of Appeals was certainly required to order such relief to the petitioner upon a showing that her substantive rights were violated by the Department's retention of several individuals whose rights to continued employment were inferior to hers. Through its "approval" of the Department's improper actions, the decision of the Court of Appeals in effect sends the message that federal agencies and departments will not

be held accountable for their noncompliance with binding regulations -- even when such noncompliance results in substantial harm to the legitimate rights and expectations of federal employees. Such a message clearly contradicts that which this Court sought to send in Vitarelli, supra.

For the foregoing reasons, petitioner respectfully prays that the writ herein be granted and the case be set down for plenary consideration by the Court.

Respectfully submitted,



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Attorney at Law and
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASSANDRA M. MENOKEN Petitioner, v. DEPARTMENT OF HEALTH AND HUMAN SERVICE, Respondent.	)	Appeal No. 85-861

DECIDED: February 18, 1986

Before FRIEDMAN, BALDWIN, and NEWMAN, Circuit Judges. FRIEDMAN, Circuit Judge.

This case is a sequel to our decision in Certain Former CSA Employees v. Department of Health & Human Services, 762 F.2d 978 (1985) (Former CSA Employees). There we affirmed the decision of the Merit Systems Protection Board (Board) that (1) upheld a reduction in force resulting from the abolition of the Community Services Administration and the transfer of

some of that agency's functions and employees to a new agency, the Office of Community Services (new agency), and (2) remanded the case to give former employees of the Community Services Administration the opportunity to show that they had greater rights to positions in the new agency than the employees who had been transferred to those positions. In the present case, the Board held in a remanded proceeding that the retention rights of the petitioner, a former Community Services Administration employee who had not been transferred to the new agency, had not been violated in the reduction in force. We affirm.

I

A. The background facts are set forth in detail in Former CSA Employees and need not be repeated here. In summary,

they are as follows:

The Community Services Administration, which administered the grants under the federal antipoverty programs made to state community action agencies, was abolished on September 30, 1981. A new agency, the Office of Community Services, was established in the Department of Health and Human Services (Department). Certain of the functions the Community Services adminstration had performed were transferred to the new agency. In Former CSA Employees, we upheld the Board's findings that, with one exception not here relevant, all the functions of the Community Services Administration had been transferred to the new agency, and we recognized that the Department had conceded that "all the Community Services Administration employees were 'identified'

with" the transferred functions. 762 F.2d at 983.

When it was abolished, the Community Services Administration had more than 900 employees. The new agency, which had only 165 employees to perform the transferred functions, filled those positions with former Community Services Administration employees. Because the Community Services Administration had not maintained adequate personnel records, the Department

> could not reconstruct exact reduction-in-force priority registers for the Community Services Administration employees or determine the exact priorities among those employees for the new positions in the Office of Community Services. It therefore established master retention lists that ranked each permanent Community Services Administration employee according to veterans preference rights and dates of service ...
>
> The Department then offered permanent appointments

> for each position in the Office of Community Services that was associated with a transferred function. The offers were made to those employees who had the highest retention standing on the master list.

Id. at 981.

On the appeal of former Community Services Administration employees who had not been selected for positions in the new agency under this procedure, the Board held that

> the Department had not followed the governing reduction-in-force procedures. The Board, however, refused to "invalidate the entire reduction in force." It ruled:
>
> > Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's non-compliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separa-

> tion from the federal service in any event.
>
> The Board remanded the case to determine "[t]he effects of this agency error as it relates to each [petitioner]." In these proceedings, each petitioner could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

Id. at 983-84.

In affirming the Board's decision, we "conclude[d] that the Board has devised an appropriate procedure to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities." Id. at 985.

B. When the Community Services Administration was abolished, the peti-

tioner was a GS-14 attorney advisor at that agency. She was not offered a position at the new agency and therefore was removed on September 30, 1981, pursuant to the reduction in force.

The petitioner was a party to the Board proceedings to review the reduction in force. Pursuant to the remand ordered in that case and after a hearing, the presiding official of the Board on August 30, 1984 (prior to our decision in Former CSA Employees), upheld the removal of the petitioner.

The presiding official held that the petitioner's function was transferred only to the new agency and that the petitioner therefore was "entitled only to compete for positions" in the new agency. The presiding official ruled that the peti-

tioner was not entitled to any of the four attorney positions in the new agency.

Three of those positions were at grade GS-15. The presiding official held that the petitioner, who had been a GS-14 in the Community Services Administration, was not entitled to any of those three positions because "[a]n employee is not entitled to assignment at a higher grade through transfer of functions or reduction in force." The presiding official ruled that the petitioner was not entitled to the GS-14 position since that position was filled by an employee who was in a higher tenure group on the master list than the petitioner.

The petitioner sought review of the Board's decision in this court. We stayed her case pending the decision in Former CSA Employees.

II

As we explained in Former CSA Employees, in the proceeding on remand each employee

> could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

Id. at 983-84. In upholding the remand procedure, we recognize, as had the Board, that although the reduction in force had not been conducted in accordance with proper procedures, it would have been inappropriate to set aside the entire reduction in force because "[o]nly a relatively small percentage" of the more than 900 employees of the Community Services Administration "were entitled to employment"

at the new agency, which had only 165 employees. Id. at 984. We further pointed out that "[a]ll or most of the employees so entitled, in fact, may have been hired." Id. We explained that on the remand the burden rests on the employee initially

> to show that there was a position in the new agency "assigned to [an]other [former Community Services Administration] employee[] with less retention standing or ... occupied by [an] employee [] who had no initial entitlement to transfer." If an employee makes such a showing, the burden then will shift to the Department to refute that showing. If the Department cannot do so, the employee will be entitled to that position. Since it is conceded by all parties before us that all Community Services Administration employees were identified with functions that were transferred, the only issue on the remand will be the relative retention priorities of the employee claiming the particular position and the employee appointed to it.

Id.

The question before us thus is whether the petitioner established that there was any position in the new agency to which she had a greater entitlement than the person appointed to that position. We conclude, as did the Board, that petitioner did not make that showing and that accordingly the Board properly upheld the application of the reduction in force to the petitioner.

A. There were four attorney positions in the new agency. The petitioner asserts that she was "qualified" for all of them. Three of the positions were at grade GS-15, but the the petitioner had been only a grade GS-14 at the Community Services Administration.

The Board correctly held that she was not entitled to any of these GS-15 positions. The petitioner's contrary argument relies upon the word "qualified" in the prior decisions of the Board and this court, which she construes to mean that she is entitled to any position in the new agency for which she had the necessary qualifications.

Read in context, however, the word meant only that in addition to showing that a particular position in the new agency was within the applicable competitive area, the employee also had to show that he had the qualifications to fill the position. Neither the Board nor the court intended to expand the scope of the employee's right to cover every position in the

new agency for which the employee might be qualified, without regard to the position he or she held in the Community Services Administration. Indeed, it would be anomalous if, as a result of a reduction in force, an employee who initially was removed could use flaws in the reduction in force to obtain a higher grade than the one he had held. As the presiding official correctly stated, "[a]n employee is not entitled to assignment at a higher grade through transfer of function or reduction in force. See 351.302(c) and 5 C.F.R. § 351.703.'" See Mello v. Department of Energy, 20 M.S.P.R. 45 (1984).

For similar reasons the Board correctly refused to permit the petitioner to show that her position in the Community

Services Administration should have been classified at grade GS-15 or that she was qualified for a position at that level. In determining the retention rights of the former employees of the Community Services Administration, the Board necessarily had to look to the situation as it actually existed in that agency when the reduction in force took place on September 30, 1981, and not to the situation that might or should have existed on that date. It would be almost impossible to determine the retention rights of employees affected by a reduction in force or transfer of function if the correctness of the classification of the positions the employees held had to be reexamined. Reductions in force deal with actual and not theoretical or possible situations.

The presiding official further held that the petitioner could not displace the incumbent of the only GS-14 position at the new agency, Alfred J. Harris, because she was in a lower retention group on the master list, group IB, than Harris, who was in group IAD. Although the petitioner contends that she had "superior rights" to three named individuals in the Department (see below), she does not contend that retention rights were superior to those of Harris, who was at the top of the master retention list. Moreover, his service computation date was July 20, 1972, and her date was January 6, 1976.

The petitioner argues that she had superior rights to three named persons at the new agency. Two of those individuals, however, were investigators from the Department of Justice who had been detailed

to the new agency. The third person, John Mayers, held a GS-15 position to which, as we have shown, the petitioner was not entitled.

B. The petitioner argues that she was entitled to displace other attorneys elsewhere in the Department besides those holding the four positions in the new agency described in part A above. The argument rests on the assertion that those other attorneys performed work for the new agency and that that fact somehow qualified the petitioner for their positions.

The functions that were transferred upon the abolition of the Community Services Administration were transferred solely to the new agency and not elsewhere within the Department. The only right

the Community Services Administration employees had was to be transferred to "a position in the new agency" that had been given to a former Community Services Administration employee with lower retention rights than the protesting employee. 762 F.2d at 984. No attorney positions were transferred from the Community Services Administration to components of the Department other than the new agency.

Attorney positions elsewhere in the Department did not become positions transferred from the Community Services Administration merely because the attorneys in those positions performed some legal work for the new agency. Indeed, there is no indication that any of those other attorney positions in the Department were filled by transferring former Community

Services Administration attorneys.

This argument of the petitioner rests upon the same erroneous concept of "qualification" that underlies her contention that she was entitled to one of the GS-15 positions in the new agency. For the reasons given in part IA, supra, this argument also fails.

C. Underlying much of the petitioner's argument is the contention that the Board was barred from any reliance upon the master retention lists in determining whether a particular former Community Services Administration employee was entitled to displace another such employee who had been transferred to the new agency. That issue, however, was litigated and decided adversely to the former Community Services Administration employes in the Former CSA

Employees case, to which the petitioner was a party.

Although neither the Board nor this court explicitly addressed the use of the master list, approval of that use was implicit in the decisions. Our decision noted that the master lists "establishing priority retention rankings for all the former Community Services Administration employee . . . did not satisfy the requirements of traditional reduction-in-force registers . . . ." 762 F.2d at 984. We nevertheless upheld the Board's handling of the case under the remand procedure it devised "to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities" as "a reasonable me-

thod of dealing with perhaps a unique and certainly most unusual situation." Id. at 985.

In so holding, we did not intend to require the Board to attempt to reconstruct "traditional reduction-in-force registers." Instead, we intended to, and did, give the Board considerable discretion in determining the bases upon which it would ascertain whether particular former Community Services Administration employees had a higher right to a position in the new agency than the employee the new agency had appointed. We cannot say the Board abused its discretion in the method it used in deciding that question in this case adversely to the petitioner.

85-861

The order of the Board upholding the application of the reduction in force to the petitioner is affirmed.

AFFIRMED

85-861

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

CASSANDRA M. MENOKEN)
) CASE NUMBER
V.) DC03518210689REM
)
DEPARTMENT OF HEALTH) DATE AUG 30, 1984
AND HUMAN SERVICES)

INTRODUCTION

The appellant filed a petition for appeal from the action of the Community Services Administration separating her through reduction in force effective September 30, 1981. Although the petition for appeal was untimely, the Board has waived the time limit for appealing. See 5 C.F.R. § 1201.12

BACKGROUND

The Community Services Administration (CSA) was abolished as an independent agency effective October 1, 1981. The appeal of this appellant and a number of

other former CSA employees were consolidated and the common issue of whether the functions of the CSA had been transferred within the meaning of 5 C.F.R. § 351.203 was considered. The employees asserted that there was a transfer and that they had the right to transfer with their functions to the newly established Office of Community Services (OCS) within the U.S. Department of Health and Human Services. A partial Initial Decision was issued regarding this question on August 20, 1982. A final Board Opinion and Order on this matter was issued on June 18, 1984. Therein, the Board found that the "category grant function performed by CSA is no longer in existence and the block grant function is a new and distinct function." Certain Former CSA Employess v. Department of Health and Human Services, MSPB

Docket No. AT03518210251, at page 12, (June 18, 1984). The Board also found that the transition grant function was identical in both CSA and OCS and that "the assumption of that function by OCS constituted a transfer of function." Id. at 13.

The Board also found that "the major functions performed by CSA were abolished and specific entitlement to compete for positions in OCS is contingent upon a showing by the individual employees that the function with which they were identified has reappeared at OCS." Id. at 14. Accordingly, the matter was remanded to the Board's Regional Offices to afford the individual appellant's the opportunity to assert that their function transferred to OCS and to identify positions to which they were entitled which was given to employees with less retention standing or

who were not originally entitled to it. Id. at 22. See also footnotes 26 and 27. The appellant was afforded this opportunity at a hearing on August 27, 1984.

ANALYSIS AND FINDINGS

The record reflects that the appellant was employed in CSA as an Attorney-Advisor, GS-14. She asserted that her function transferred to some three competitive areas in the Department of Health and Human Services (HHS). The agency essentially did not dispute that as a former employee of CSA's Office of Inspector General, the appellant's functions transferred to OCS. The appellant's only basis for also contending that her function transferred to HHS's Office of General Counsel and HHS's Office of Inspector General, is the agency's response to an interrogatory she posed. In response

to the appellant's question about who may have performed various duties that had been assigned to her in CSA, the agency responded, inter alia, "HHS's OGC has provided legal services to the OCS, in the same manner as other operating divisions of this Department as the need has arisen." Agency Exhibit #1.

This statement is part of a general denial by the agency that a function from CSA transferred in recognizable form to any other segment of HHS except OCS. I do not find that it establishes that the appellant's function transferred to these various competitive areas. I find that the appellant's function transferred only to OCS, and that OCS is the continuing competitive area within the meaning of 5 C.F.R. § 351.302. The appellant is entitled only to compete for positions there. See 5 C.F.R. § 351.203, 302, and 401.

Of the attorney positions in OCS, the appellant asserts entitlement to all of them. The record reflects that OCS filled two permanent and two temporary positions. Three of these positions were GS-15 level positions. An employee is not entitled to assignment at a higher grade through transfer of function or reduction in force. See 351.302(c) and 5 C.F.R. § 351.703. Thus, I find that the appellant had no entitlement to any GS-15 level position. The remaining position, a permanent position, was a GS-14 level position and was filled by a tenure group IAD employee. The appellant was a tenure group IB employee. I find that the appellant had no right to retention over a group IAD employee. Based upon my review of the complete record in this case, I find no evidence that any of the appellant's retention rights were violated.

DECISION

The reduction-in-force action affecting this appellant is hereby AFFIRMED.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on Oct - 4 1984 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Di-

rector may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. § 7701 (e)(2). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Ave. N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an original and two copies should be forwarded to the Office of the Secretary.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days

of the final Board decision. 5 U.S.C. §7703(b)(1).

For the Board:

/S/
Martha J. Lanphear
Presiding Officer

gbk

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTAIN FORMER CSA EMPLOYEES,	)	Misc. Docket No. 42 and
Petitioners,	)	Appeal No. 85-501 (Petition for Writ of Mandamus)
v.	)	
DEPARTMENT OF HEALTH & HUMAN SERVICES,	)	
Respondent.	)	MSPB Docket No. AT03518210251

DECIDED: May 20, 1985

Before FRIEDMAN, KASHIWA and NEWMAN, Circuit Judges. FRIEDMAN, Circuit Judge.

These appeals and a petition for mandamus raise various questions concerning the removal from the Community Services Administration of all of its employees in a reduction-in-force resulting from the abolition of that agency and the transfer of some of its functions and employees to

a new agency, the Office of Community Services. The Merit Systems Protection Board (Board) upheld the removal but gave the individual employees the opportunity to show that they were entitled to occupy the positions at the new agency instead of other former Community Services Administration employees who had been appointed to those positions. We affirm the Board, and deny the petition for mandamus.

I

For many years the Community Services Administration administered the grants under the anti-poverty program that the federal government made to community action agencies in the states. The Community Services Administration made the grants directly to those agencies and closely controlled and supervised both the making

of grants and the agencies' spending of the money. It did this to insure compliance with detailed federal standards governing the grants. The Community Services Administration was an independent agency, which in September 1981 had more than 900 employees.

In August 1981, in the Omnibus Budget Reconciliation Act of of 1981 (Budget Reconciliation Act), Pub. L. No. 87-35, 95 Stat. 357 (1981), Congress made a major change in the federal anti-poverty pro gram. In place of the prior practice under which the federal government selected the grant recipients and closely supervised their compliance with detailed federally prescribed standards, Congress provided that beginning October 1, 1981, federal anti-poverty funds would be distri-

buted through block grants to the states. The states would determine the basis upon and the agencies to which those funds would be distributed and would be responsible for supervising the proper implementation of the grants. Apart from making the grants to the states, federal involvement in the program would be minimal.

The Budget Reconciliation Act terminated all funding of the Community Services Administration as of September 30, 1981. The Act created a new agency in the Department of Health and Human Services (the Department), the Office of Community Services. The new agency would handle the anti-poverty program on the block-grant basis and also would perform

certain functions of the Community Services Administration that would be continued during a transitional period. In describing these arrangements, the Conference Committee Report on the Budget Reconciliation Act stated:

> The conferees emphasize that the Community Services Administration, as an agency, is terminated and that the Community Services Block Grant is clearly a new program within the Department of Health and Human Services, not a transfer of authority.

H.R. Con. Rep. No. 208, 77th Cong., 1st Sess. _____, _____, reprinted in 1981 U.S. Code Cong. & Ad. News 1010, 1129.

The President signed the Budget Reconciliation Act on August 13, 1981. Two weeks earlier the Director of the Community Services Administration had distributed to all employees at the agency a general reduction-in-force notice, which

stated that that the President had requested no funding for the agency for the next fiscal year beginning October 1, 1981, that the agency might terminate, and that the employees' jobs might end on September 30, 1981. The notice included general information about reductions-in-force.

On August 21, 1981, the Community Services Administration sent specific reduction-in-force notices to all employees. The notice stated that because the agency had received no funding for the next fiscal year, all positions there were abolished, that no positions were available for reassignment, and that the employees would be separated as of September 30, 1981. On the latter date:

(1) All Community Services Adminis-

stration employees, other than those who had resigned in the last two days (to protect their severance pay), were separated pursuant to the reduction-in-force;

(2) The Office of Community Services was established as an operating division in the Department. The Department determined that the new office would need 165 employees during its first year of operation to handle the functions that would be transferred to it.

On September 12, 1981, a union representing Community Services Administration employees filed a suit in the United States District Court for the District of Columbia to require the Department to fill the positions in the Office of Community Services with employees of the Community Services Administration. The union con-

tended that all the functions of the old agency would be transferred to the new agency and that under the statute governing the rights of employees of an agency, functions of which were transferred to another agency, 5 U.S.C. § 3503 (discussed infra, p. 10), the employees of the old agency were entitled to transfer to the new agency. The district court entered a temporary restraining order on September 22, 1981, and a preliminary injunction on October 13, 1981. National Council of CSA Locals, American Federation of Government Employees (AFGE) AFL-CIO v. Schweiker, 526 F. Supp. 861 (D.D.C).

The court held that "Congress has not exempted the transfer of anti-poverty pro-

grams from the Community Services Administration to the Department of Health and Human Services . . . from the coverage of" 5 U.S.C. § 3503, and that the Secretary therefore "must select any employees pursuant to the preferences accorded under" the latter statute. It permanently enjoined the Secretary "from selecting employees to administer the former Community Services Administration programs without giving preferences as required by" section 3503. Id. at 866. The court further held that the determination "whether there has been a transfer of functions from CSA to HHS and/or a transfer of functions of former CSA employees to HHS" should be made in the first instance by the Secretary, subject to review by the Board. Id. at 864.

The Secretary determined that four functions had been transferred from the Community Services Administration to the Office of Community Services: The close-out of the Community Services Administration operations, the work of the Inspector General, certain discretionary programs, and the loan fund activities. The Secretary "further determined that [the] block grant and transition activities were new programs of OCS, and, therefore, with respect to those activities no transfer occurred." (Stipulation No. 23)

The Secretary also determined that "all former [Community Services Administration] employees were identified" with the transferred functions.

The Department filled the 165 positions in the Office of Community Services

covering the functions the Community Services Administration had performed in the following manner:

Because of the inadequate job descriptions and other defects in the records of the Community Servi es Administration and the dispersal of the employees of that agency, the Department could not reconstruct exact reduction-in-force priority registers for the Community Services Administration employees or determine the exact priorities among those employees for the new positions in the Office of Community Services. It therefore established master retention lists that ranked each permanent Community Services Administration employee according to veterans preference rights and dates of service. Separate lists were made for different types

of appointments (competitive or excepted services) and competitive areas (headquarters and each regional office).

The Department then offered permanent appointments for each position in the Office of Community Services that was associated with a transferred function. The offers were made to those employees who had the highest retention standing on the master list. Employees who accepted the offers were treated as restored to duty as of October 1, 1981, and were given backpay from that date. Employees who rejected the offer or who did not receive any offer because of their lower position on the master retention list were placed upon the Department's reemployment priority list.

Employees of the Community Services

Administration who had not been selected under this procedure appealed their September 30, 1981 dismissals to the Board. They contended that because the Community Services Administration had not complied with 5 U.S.C. § 3503 and the implementing regulations, 5 C.F.R. §§ 351.301-03 (1982), the entire reduction-in-force was invalid; that under that statute each of them should have been transferred to the Office of Community Services when the Community Services Administration was abolished on September 30, 1981; and that they were entitled to reinstatement with backpay to positions with the Office of Community Services, which they could hold until the latter agency terminated them pursuant to a proper reduction-in-force.

Several of these employees moved the

Board, under 5 C.F.R. § 1201.27 (1982), to hear the appeals as a class action or, alternatively, to consolidate their appeals with those of the other former employees. The Board refused to hear the appeals as a class action, but granted a limited consolidation to determine those "common issues of law and fact which [were] national in scope." It referred the appeals to its chief administrative law judge for an initial decision on those issues.

After a hearing, the administrative law judge held that all former employees had transfer rights because all the functions of the Community Services Administration, including the transition and block grant functions, had been transferred to the Office of Community Services

or, alternatively, because the latter had replaced the former in performing those functions. He also determined that the Department did not use either or the prescribed methods for identifying competing employees with a transferring function, as 5 C.F.R. § 351.303(c) and (d) (1984) require, and that as a result the Department "did not accord the appellants their substantive rights when it effected the reduction in force." The judge concluded, however, that "[s]ince it is virtually impossible in this case to reconstruct a properly administered reduction in force on a retroactive basis for the purpose of ascertaining the relative retention standing of [the] employees, . . . the Board should ratify the . . . RIF procedure" the Department actually used.

The Board granted review and modified the decision. Although the Board agreed that the transition function had been transferred, it held that there was "insufficient credible evidence to support" the conclusion "that the 'block grant' function [was] transferred." The Board further ruled that "the ALJ erred in his alternative finding that the employees were entitled to transfer of function rights under 5 U.S.C. § 3503(b)."

The Board noted that "[t]here is no dispute that upon invoking the transfer of function procedures, the agency failed to utilize either of the permissible methods of identification." "Accordingly," the Board concluded, "the agency was remiss in meeting the responsibilities and obligations imposed by the regulations."

The Board determined, however, that this defect in the proceedings "does not warrant unconditional reversal of the entire reduction in force." Instead, the Board remanded the case for further hearing to enable each employee "to assert that he was identified with a continuing function," and "identify a position . . . assigned to [an]other employe[e] with less retention standing or . . . occupied by [an] employ[ee] who had no initial entitlement to transfer." "Should an [employee] present evidence that tends to establish that he was denied retention to which he was otherwise entitled . . . and the agency is unable or unwilling to refute such evidence by showing it to be untrue

or that his retention standing would not have provided such benefit, the [employee] would prevail."

Subsequently, the Board decided appeals by other former Community Services Administration employees who were not parties to the consolidated cases. In those cases the Board essentially reiterated its decision in the consolidated cases.

II

In No. 42 Misc., the petitioners challenge the decision of the Board on the "common issues of law and fact" described above. The government has moved to dismiss this appeal. It contends that since the Board remanded the case to permit each discharged employee to show that he had a higher retention right to a position in the

Office of Community Services than the former Community Services Administration employee selected for the position had, there is no "final order or final decision" of the Board that we have jurisdiction to review under 28 U.S.C. § 1295(a)(9) (1982).

At least one of the petitioners, however, Ms. Wilkerson, has "abandoned any claim to relief under standards announced by the Board's order," choosing "instead to stand solely on dispositive claims common to all CSA employees." The Board's decision is therefore final as to her, and we clearly have jurisdiction to review it. At oral argument, the government conceded that we could resolve all the questions presented in No. 42 Misc., in Ms. Wilkerson's appeal. In these circumstances

there is no occasion to determine whether, in the absence of that appeal, we would have jurisdiction to review the Board's decision at this stage of the case.

III

Section 3503 of Title V of the United States Code (1982) provides:

> (a) When a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.
>
> (b) When one agency is replaced by another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

Subsection (a) thus requires that, when there has been a transfer of functions from one agency to another, an employee of the

transferring agency shall be transferred to the receiving agency for employment "in a position for which he is qualified" before the receiving agency appoints a person not from the transferring agency to that position.

An implementing regulation provides:

> (a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

5 C.F.R. § 351.302(a) (1982).

In this case, the Board found that the block grant function was a new function and therefore had not been transferred from the Community Services Administration to the Office of Community Ser-

vices Administration to the Office of Community Services, but that the other functions of the former agency had been so transferred. That finding is supported by substantial evidence, and we have no basis to disturb it.

The Department conceded, both in the administrative proceedings and before this court, that all the Community Services Administration employees were "identified" with the functions that were transferred from that agency to the Office of Community Services. In the light of that concession, section 3503(a) required the Department to offer Community Services Administration employees positions in the Office of Community Services for which they were qualified before hiring anyone else for those positions.

The Department did not do so initially, since it took the position that because the Community Services Administration was being abolished, its employees had no reassignment rights. Following the district court's decision in the Schweiker case (supra, p. 4), however, the Department corrected its error. It filled all of the jobs in the Office of Community Services associated with the transferred functions with former employees of the Community Services Administration, made the appointments of those employees effective as of October 1, 1981, and gave the employees backpay to that date. The result of this action was retroactively to give the reemployed Community Services Administration employees all the rights

they had under section 3503(a).

The Board recognized that at the time of the termination of the Community Services Administration and the establishment of the Office of Community Services -- which the Department treated as a reduction-in-force -- the Department had not followed the governing reduction-in-force procedures. The Board, however, refused to "invalidate the entire reduction in force." It ruled:

> Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's noncompliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separation from the federal service in any event.

The Board remanded the case to determine "[t]he effects of this agency error as it relates to each [petitioner]." In these proceedings, each petitioner could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

In challenging this ruling, the petitioners contend that "an illegal separation is null and void," that each employee therefore "must be treated for pay purposes as if the separation had not occurred, subject, of course, to any valid

subsequent separation action," and that each is now entitled to reinstatement with backpay. Alternatively, they contend that reversal is required "because the government failed to create and maintain the records needed to calculate the hypothetical reduction in force."

In arguing that all of them are entitled to reinstatement with backpay, the petitioners rely primarily upon Vitarelli v. Seaton, 359 U.S. 535 (1959). There the government had dismissed Vitarelli as a security risk. The Court set aside the dismissal as "illegal and of no effect," id. at 544, because the proceedings by which it had been effected violated the governing regulations. It concluded: "It follows from what we have said that peti-

tioner is entitled to the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment in the Department of the Interior." Id. at 546.

The present case is far removed from Vitarelli. There only a single employee was involved, the Court held that he had been improperly discharged from his position, and it ordered him reinstated to the position he had occupied. The present case, in contrast, involved a reduction-in-force in which more than 900 employees sought reinstatement with a new agency that had only 165 positions to fill. There was no way in which the Office of Community Services could have hired all

the former employees of the Community Services Administration. Only a relatively small percentage of the Community Services Administration employees were entitled to employment at the Office of Community Services. All or most of the employees so entitled, in fact, may have been hired. We decline to extend the principle applied in Vitarelli (and in the other similar cases upon which the petitioners rely) to the wholly different factual situation here.

In selecting the 165 employees to fill the positions at the Office of Community Services, the Department relied upon master lists establishing priority retention rankings for all the former Community Services Administration employees. Supra, p. 6. Those lists did not

satisfy the requirements of traditional reduction-in-force registers, since they did not show the competitive levels of each employee, 5 C.F.R. § 351.403 (1984), and there were no separate retention registers for each competitive level, 5 C.F.R. § 351.404 (1984).

Accordingly, there may have been some former Community Services Administration employees who were not given jobs with the Office of Community Services to which they would have been entitled if the Community Services Administration had conducted a proper reduction-in-force.

The remand procedure that the Board adopted in this case was designed to enable individual employees who are in that situation to obtain the jobs they should

have obtained. As noted, under the procedure, individual former Community Services Administration employees will be given the opportunity to show that there was a position in the new agency "assigned to [an]other [former Community Services Administration] employee[] with less retention standing or . . . occupied by [an] employee[] who had no initial entitlement to transfer." If an employee makes such a showing, the burden then will shift to the Department to refute that showing. If the Department cannot do so, the employee will be entitled to that position. Since it is conceded by all parties before us that all Community Services Administration employees were identified with functions that were transferred, the only is-

sue on the remand will be the relative retention priorities of the employee claiming the particular position and the employee appointed to it.

In directing this procedure, the Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined. It stated:

> We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. There is ample evidence available in the file concerning the organization and functional activities of CSA. In addition, we note that many of the positions within CSA were identical and located in the same organization.

Although the petitioners challenge

factual basis for these findings, we conclude that they are supported by substantial evidence. Ms. Olivari, a department classification specialist, was the only witness who had reviewed the Community Services Administration records. She found that they were sufficient to make a "functional comparison" of the position descriptions to determine what functions of the Community Services Administration had been transferred to the Office of Community Services. Ms. Olivari also testified that the necessary information could be obtained through a procedure known as a "desk audit," and that one could "conduct a regular desk audit after an agency has been abolished."

The petitioners contend, however, that because the government was at fault

in not having proper reduction-in-force registers for the Community Services Administration employees, the Board was precluded from adopting the remedy it selected, on the ground that the government should not be permitted to profit from its own wrongdoing. There is no issue here about the government's "profiting" from the failure to maintain proper records. As we have held, only a relatively small number of Community Services Administration employees were entitled to employment at the Office of Community Services (165 out of 900).

We conclude that the Board has devised an appropriate procedure to determine whether any or the employees of the former agency who were not employed at

at the latter agency should have been so employed because of their retention priorities. We also have upheld, supra, p. 16, as supported by substantial evidence, the Board's finding that the retention priorities of Community Services Administration employees who were not transferred can now be determined. These conclusions answer and require rejection of the petitioners' argument based on the government's fault in not providing reduction-in-force registers for the Community Services Agency employees.

In evaluating the Department's and the Board's treatment of this case, it is essential to recognize that this was not a typical reduction-in-force situation. Normally, reductions-in-force result from

a decrease in the agency's available funds, a change in the agency's workload, or a transfer to another agency of a portion of an agency's work. The present case, however, resulted from the elimination of an entire agency in connection with a significant change in the program that agency had administered, and the creation of a new agency to handle under a different program of some the work the old agency did.

The Board's handling of this case constitued a reasonable method of dealing with perhaps a unique and certainly most unusual situation. In our opinion, it was one that fairly and appropriately adjusted and accommodated the competing and substantially conflicting interests of the employees and the government.

IV

The petitioners also challenge the Board's refusal to treat their appeal as a class action on behalf of all former Community Services Administration employees who were not employed at the Office of Community Services.

The standard for determining whether an appeal to the Board will be heard as a class action is set forth in 5 C.F.R. § 1201.27(a) (1984):

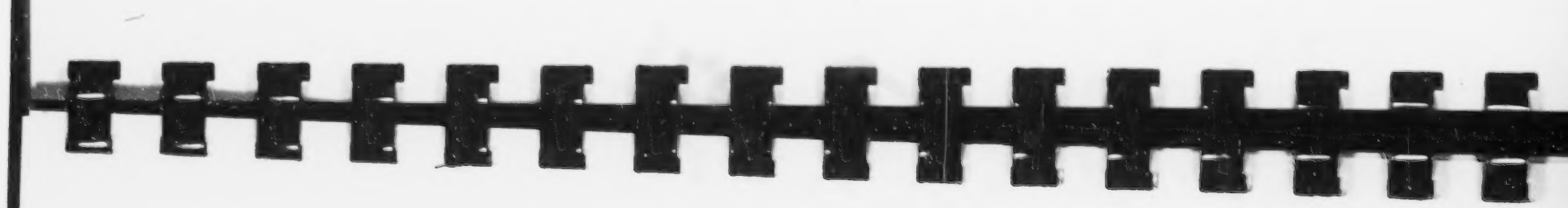
> The presiding official shall hear the case as a class action if he/she finds a class action will be the most efficient and fair way to adjudicate the appeal and will adequately protect the interests of all parties.

The decision whether to grant class action status is largely committed to the Board's discretion. Cf. Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980) ("The standard of

review of the denial of class certification [by a district court] is whether the court abused its discretion.") We cannot say the Board abused its discretion here in denying class action status.

In refusing class action status, the Board concluded that the limited consolidation it ordered -- "only for the purposes of consideration of the common issues of law and fact which are national in scope" -- would be "the most expeditious, equitable, and administratively efficient procedure." It stated:

> We believe that such consolidation will meet the concerns of all parties, and will result in a more manageable proceeding than would a combined class action and consolidated proceeding. Moreover, this procedure will assure the preservation of individual rights with



> respect to those issues which are not common, and complete individual appellate records in the event of judicial review.

The petitioners have not given any convincing reason why the Board's ruling was unwarranted. Indeed, in view of our decision on the merits of the case, it is difficult to see how the petitioners have been prejudiced by the Board's failure to convert their individual appeals into a class action. Even if the Board had provided for class action treatment in deciding the common issues, it still would have been necessary under the Board's decision to remand the case for separate hearings with respect to the individual petitioners.

The Board noted that "[t]he main

concern expressed by those requesting a class action is that many former employees have not filed appeals to the Board, in reliance on either the class action petition or" the district court's order in Schweiker. It "recognize[d] that former CSA employees could justifiably have delayed the filing of their appeals in reliance on [the district court's] Order, which stated that any former CSA employee who was dissatis[fied] with the HHS determination regarding functions transferred from CSA would have a right of appeal to the Board." It stated:

> In light of the foregoing circumstances, it is reasonable to assume that many former CSA employees are awaiting notification from HHS, and are unaware of the fact that the filing period for their appeals has expired. Therefore, HHS is hereby ORDERED to notify all former CSA

> employees of their precise status within 15 days of the receipt of the Order, and to advise all such employees that they may appeal the HHS determination to the appropriate regional offices of the Board no later than 20 days after their receipt of the HHS notification.

The petitioners contend that the notice the Department sent in response to this directive was inadequate because it did not inform the employees that they had been dismissed under the procedures the Department followed in response to the order of the district court. At the present stage of this case, however, any question concerning the adequacy of the notice to inform the former Community Services Administration employees of their right to appeal to the Board is premature. That is an abstract question, since we cannot tell

whether in fact any employees refrained from taking an appeal in response to a notice that on its face seems adequate to inform the employees of their rights.

V

The petitioners urge us to issue a writ of mandamus to require the Board to order their reinstatement with backpay to positions at the Office of Community Services. The reasons that have led us to affirm the Board also require denial of the petition for mandamus, which is not a substitute for appeal Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943).

CONCLUSION

The decision and order of the Merit Systems Protection Board is affirmed. The petition for a writ of mandamus is denied.

AFFIRMED AND MANDAMUS DENIED.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CERTAIN FORMER COMMUNITY COMMUNITY SERVICES ADMINISTRATION EMPLOYEES, ADAMS, et al. Appellants.	
v.	DOCKET NUMBER AT03518210251*
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	

OPINION AND ORDER

This case comes before the Board pursuant to separate petitions for review filed by the Department of Health and Human Services (HHS), and on behalf of approximately 297 1/ former employees of the Community Services Administration

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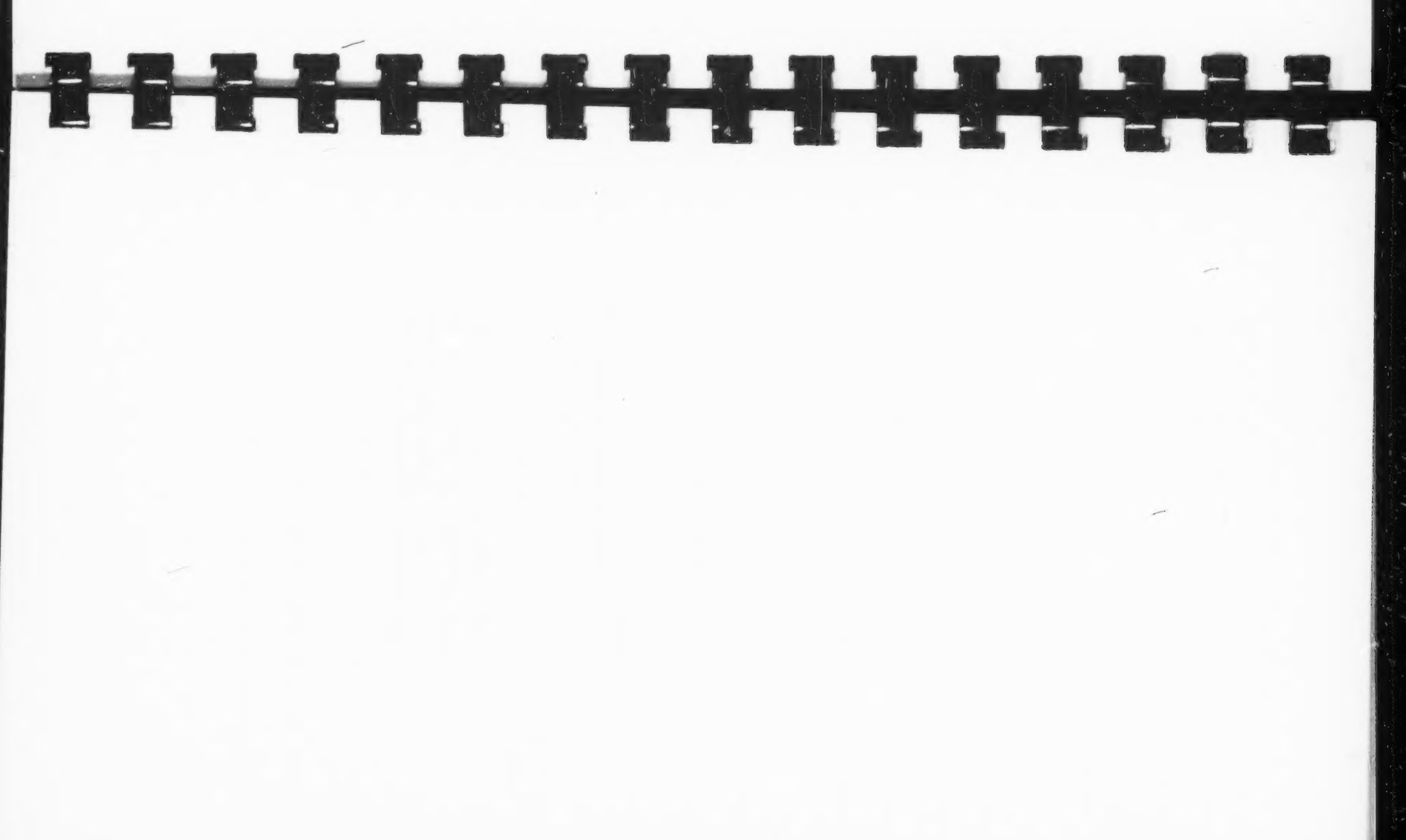
1/ Orginally seventy-eight other appellants were part of the consolidated case at the initial level. However, pursuant to agency filed motions to dismiss those individual appeals based on the absence of Board jurisdiction, those appeals were dismissed and are no longer considered part of this consolidation.



(CSA) identified in Appendix A. 2/ The chronology of events leading to the petitions for review is as follows.

The CSA operated grant programs pursuant to the authority of the Economic Opportunity Act of 1964. 42 U.S.C. § 2701 et seq. 3/ In July of 1981, the Director of CSA distributed general notices of reduction in force to all CSA

2/ The petition for appellants was submitted by Janice M. Xaver. Ms. Xaver was initially retained by the National Council of CSA Locals (American Federation of Government Employees) and she served as lead counsel at the initial level.

3/ The Economic Opportunity Act of 1964, 42 U.S.C. § 2701, et. seq., established the Office of Economic Opportunity (OEO). In 1974, the Community Services Administration was established as an independent agency, P.L. 93-644, Headstart, Economic, and Community Partnership Act of 1974, 88 Stat. 2291.

*Partial Initital Decision was issued under Docket Number HQ12008110063.

employees. The notice advised the employees of the possibility that as of September 30, 1981, the agency would no longer be funded. Subsequently, on August 13, 1981, the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, (Budget Act) was signed into law by President Reagan. Title VI of the Budget Act abolished CSA as an independent federal agency effective October 1, 1981. Under date of August 21, 1981, all CSA employees were issued specific notices of reduction in force which advised them that CSA programs would be funded by block grants, that their positions were abolished and that they would be separated as of September 30, 1981. 4/

4/ The notice was issued under the signature of Dwight Ink, the Director of CSA. Stipulation #3.

On September 12, 1981, the appellants filed a complaint in the United States District Court for the District of Columbia contending that CSA employees had the right under 5 U.S.C. § 3503 to transfer to the Department of Health and Human Services. The appellants also filed a motion with the the court for a preliminary injunction to prevent HHS from filling positions that were allegedly transferred to the newly established Office of Community Services (OCS). That office was established as an operating division in the Department of Health and Human Services on September 30, 1981. On October 13, 1981, a preliminary injunction was issued by the court preventing the agency from filling in OCS. Subsequently, on October 16, 1981, the court ruled that Congress had not exempted the transfer of function from the Veterans' Preference

Act.5/ The court made no specific determination of what functions transferred to HHS, but concluded that the appropriate remedy was for the employees to exhaust their administrative remedies before the Merit Systems Protection Board.

Thereafter, the Board assigned the case to its Chief Administrative Law Judge (ALJ). After the completion of discovery, the ALJ afforded the parties a hearing on the common issues of law and fact. The ALJ rendered his partial initial decision (PID) on August 20, 1982. The ALJ concluded that all the functions of CSA transferred to OCS. 6/ He also found that CSA

5/ National Council of CSA Locals, American Federation of Government Employees (AFGE) AFL-CIO v. Schweiker, 526 F. Supp. 861 (D.D.C. 1981).

6/ The parties agreed that a transfer of function occurred with respect to the closeout, Inspector General, discretionary programs, and loan fund activities.

was replaced by OCS and that the agency erred in failing to comply with the pertinent regulations and procedures both as to the identification of employees with the transferred function and the subsequent reduction-in-force procedures resulting from the transfer.

Notwithstanding the noncompliance with the regulations regarding the identification methods used by the agency in effecting the the transfer, the ALJ urged acceptance of the procedure in light of the fact that it was "virtually impossible in

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Stipulation #23. In addition, the ALJ found that both the "block" grant and the "transition" grant function transferred from CSA to OCS. A block grant is one that is authorized by the Community Service Block Grant Act whereby funds are specifically awarded to the states for disbursement. A transition grant is where the states elect to have OCS disburse the funds awarded to various Community Action Agencies within the states in the same manner as was done by CSA. The transition grant was authorized for fiscal year 1982 only.

this case to reconstruct a properly administered reduction in force." PID at 23. The ALJ further concluded that the appellants were entitled to back pay from October 1, 1981 until the date that offers of employment were first transmitted to the appellants in January 1982. PID 23-24. The petitions for review are hereby GRANTED. 5 U.S.C. § 7701 (e)(1).

ANALYSIS

The issue before the Board is whether a transfer of function has occurred. Before examining the functions now performed by OSC and determining whether those functions transferred from CSA, however,8/ we begin our analysis by examining the

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8/ This approach is completely consistent with one of the earliest interpretations of transfer of function contained in the United States Civil Service Commission Cir. No. 740, dated January 24, 1954. That circular stated: "The test as to whether there was a transfer of function . . . (a) depends upon a judgment as to whether, in

term "function". Although this term evolved from the Reorganization Act of 1939 (53 Stat. 562) and the Veterans' Preference Act of 1944, neither of those statutes Preference Act of 1944, neither of those statutes defined function. 9/ Subsequently, the former Civil Service Commission defined function as "all, or a clearly identifiable segment of, an agency's mission (including all integral parts of that mission), regardless of how it is performed." 5 C.F.R. § 351.203 (c).

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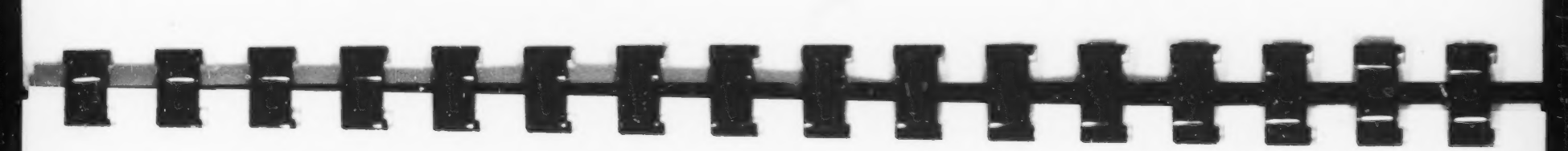
conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organization entity."

9/ The regulations adopted by the Civil Service Commission to implement section 12 of the Veterans' Preference Act merely copied the statutory language. 5 C.F.R. § 12.306 (1944 Supp.). No attempt was made at the time by the Commission to define or otherwise explain what was meant by the term function.



Although this definition may be imprecise, we see no reason to disregard it or alter this definition since it has been utilized by both the Commission and the Office of Personnel Management. However, we will examine in detail the past application of this term in order to provide guidance to resolve this case.

In McNamara v. Dick, 323 F.2d 276, (D.C. Cir. 1963) cert. denied, 84 S.Ct. 171 (1963), the court held the term had to be associated with the "authority, powers and duties" that an agency was "expressly authorized by law" to perform. Therefore, a function has to be a clearly identifiable activity of the agency's mission which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission. Enos v. Macy, 321 F.2d 748 (D.C. Cir. 1963). In addition,

there must be either a quantitative or qualitative method of identifying the activity as a function. This is necessary in order to ensure traceability when the function is transferred from one entity to another.

Therefore, it is the functional activities that are described in an agency's enabling legislation, organization manuals, and delegations of authority that are clearly of most significance in determining whether a function has been transferred. Such documents describe the general activties that form the nucleus of the agency missions from which all other activities stem.

Once the functions of any two entities are isolated in this fashion, the function of the first entity can be traced to determine whether the function has been

transferrd or otherwise disposed of,10/ as envisioned by the transfer of function regulations. See 5 C.F.R. § 351.203 (h) (1).

Although the ALJ concluded that the "block grant" function transferred from CSA to OCS, we find insufficient credible evidence to support this conclusion. The ALJ relied on the legislative statement of an agency's purpose as determinative in resolving the transfer of function issue. While an agency's general "manifesto" of its purpose is relevant, it cannot, in and of itself, be a function. Such a statement provides insufficient information to ascertain the actual and specific "authorities, powers and duties"

10/ 5 C.F.R. § 351.302 (b) provides that a function transferred solely for liquidation does not entail any retention benefit to the employee identified with the liquidated function.

that form the central operations performed by an agency. The "manifesto" is not a segment of the agency's mission but rather the result desired. Its intangible nature precludes any type of measurement and the traceability envisioned by the transfer of function regulations. 5 C.F.R. § 351.303. Moreover, the adoption of such an approach over-simplifies the complexities of government and understates the assortment and possible duplication of activities performed by agencies.

While the enabling legislation is of some value, the performance of a particular activity is of far more relevance. Thus, if the evidence shows that the functions performed by CSA and OCS are interchangeable and are now being performed by OCS, a transfer of function has been accomplished. On the other hand, it the evidence shows that the functions of OCS are new and different, the result

must be that no transfer of function has taken place. Our task has been simplified by the stipulations concerning four of the functions that have transferred to OCS. See note 6, supra. There remain in dispute, the "block" and "transition" grant functions. We must proceed to examine the functional statements of authority, available organizational information and the enabling legislation and its history of both agencies in order to facilitate resolution of the transfer issue.11/

BLOCK GRANT FUNCTION

CSA, as the successor to the Office of Economic Opportunity, inherited the functional responsibility of awarding

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11/ The Office of Personnel Management has intervened and submitted a brief in support of the agency's position relating to the "block" grant issue.

grants and administering grant programs. Economic Opportunity Act of 1964 (EOA), as amended, 42 U.S.C.§ 2701. It is clear that CSA was established as an independent agency. Title VI, § 601 (c), 42 U.S.C. § 2941 (c). The administrative functional authority of the CSA Director was substantial. Tr. II, 64 106. CSA fulfilled its obligations under the EOA awarding grants directly to Community Action Agencies (CAAs) within the states. EOA, Title II, Part A. These specific grants were generally labeled as "category" grants.

A review of the enabling legislation for the Budget Act,12/ discloses that the Director of OCS, through delegations

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12/ More precisely, the section under dispute is known as the Community Service Block Grant Act (CSGA), § 671 of the Budget Act.

from the Secretary of the HHS,13/ is authorized to "make grants . . . to the States". Section 672 (a). Section 675 (c) (8) provides that the States will coordinate the anti-poverty programs in each community.

A comparison of the organizational structure and the specific delegations of authority for CSA with the delegations of OCS reveals significant differences in content and substance.14/ CSA had authority to select and award specific grants

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13/ Section 676 of the CSGA established an Office of Community Service within the HHS to perform the functions of the Secretary consistent with the provisions and limitations outlined by the specific provisions of the statute.

14/ Such a comparison also entails a review of the EOA and the CSGA since the authority for the activities performed stems from the various provisions of those statutes.

to CAAs15/ whereas OCS does not. These grants were awarded by CSA consistent with and subject to detailed standards and regulations (45 C.F.R. Subpart B, Chapter X), which were directly administered by CSA. OCS issued no standards or regulations and the grants funded are directly administered by the states. CSA formulated policies, procedures and guidelines controlling of how the grantees would utilize the funds provided. Conversely, OCS does not formulate policies or procedures, or otherwise directly control the specific methods by which the CAAs or other grantees utilize the allocated funds. CSA's oversight responsibilities entailed substantial monitoring and auditing proce-

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15/ CSA awarded these grants to the CAA's to promote and carry out specific programs consistent with the EOA. (Tr. II, 58, 61, 62, 65-66, 68).

dures to ensure compliance with its established standards and regulations. In contrast, OCS's oversight responsibility is limited and its control over the expenditure of funds is severely restricted. Tr. II, 107-8. The CSA Director was granted broad authority and was responsible for the coordination of all anti-poverty programs. Tr. 65, 106.16/ The Director of OCS retains only limited au-

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16/ The PID understated the full scope of the administrative responsibilities performed by CSA. For example, an analysis of the EOA indicates the extent of these activities: CSA was charged with the responsibility of designating CAAs, section 210; assuring that CAAs have appropriate plans and evaluate the varius programs, initiated and sponsored projects responsive to the unmet needs of the poor; establishing procedures by which the poor could influence the programs affecting their interest; and encouraging the participation of business, labor and other private groups, section 212; establishing criteria for community action programs, section 210 (a)(3); providing technical assistance to communities and training for personnel, section 230; achieving an equitable distribution of local initiative

thorities and the coordination of the anti-poverty programs is specifically designated to the state entities. CSGA, § 675 (c) (h).

Unlike the original authorization to CSA of broad administrative powers and responsibilities, the legislative history of the Budget Act contains strong language manifesting the breadth of the Congressional limitations placed on the newly established OCS. Congress unequivocally expressed its desire to abolish CSA and establish a new function:

> The Conference emphasizes that the Community Services Administration as an agency is terminated and that the

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funds between urban and rural areas, section 214; and auditing each grnat or contract at least once annually, section 243. Further, the Director, pursuant to Title VI, was required to set standards for the wages of laborers and mechanics employed by contractors and sub-contractors and the wages of persons employed in carrying out programs financed under Title II, section 607 and section 610.

> Community Service Block Grant Function is a new program within the Department of Health and Human Services, not a transfer of authority.

H.R. Rep. No. 208, 97th Cong., 1st Sess. 767-768 (1981). A similar view is expressed in the Senate Report.

> To emphasize the committee's commitment that the Federal government shall not burden the State's administrative structure, the committee has in several places in the block grant bills stated exactly what paperwork and reporting requirements it has in mind. In each case they are straightforward and easy to comply with, designated to provide necessary accountability without detracting from the state's authority to allocate the block grant resources. The committee's bills are meant to be definitive with regard to paperwork, reports, and accountability. The Secretary is specifically directed not to interpret these requirements by regulation or otherwise go beyond the explicit boundaries of the limited federal role clearly defined in the bill. For example, the committee intends that the application be extremely simple. The Secretary should submit to the states an application that plainly lists the assurances required in the statute. The governors should be required only to sign and date the application and return it to the Secretary.

S. Rep. 97-139, 97th Cong., 1st Sess. 908, reprinted in 1981 U.S. Code Cong. & Ad. News, 932.

The expanded role of the state entities was also highlighted:

> The Act places greatly increased responsibilities on State governments to design and administer effective programs while assuring against development of large state bureaucracies and failure to deal with poverty problems at the community level. The The Act requires the Chief Executive of the State to certify that funds will be used for a variety of specific, eligible purposes, sets a strict limit on state administrative expenses, and requires special consideration for existing Community Action Agencies, or other community based organizations, provided they are able to meet appropriate program and fiscal requirements established by the State. This encourages States to continue funding effective Community Action Agencies, while recognizing that, if the States are to be held accountable for the effectiveness of programs, they must have flexibility in selecting agencies to be funded, in requiring those agencies to meet certain accepted standards.

Id. at 912, 1981 U.S. Code Cong. & Ad. News at 936. The Senate Report also

specified the intent to restrict federal involvement:

> As is clear, the committee intends that States be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administrative and regulatory direction. Nonetheless, the expenditure of federal funds, as all contracting relationships, must be accompanied by some accountability that funds are not misdirected or fraudulently used. The Secretary is specifically empowered to withhold funds, but only if the State has misused funds by a substantial and serious failure to carry out its assurances and the general requirements of the statute. Such withholding cannot be made for minor or insubstantial deviations or without adequate notice and opportunity for a public hearing to be conducted with the affected state and at which all interested parties are represented.

Id. at 909, 1981 U.S. Code Cong. & Ad. News at 936. This intent was acknowledged by the minority view:

> We are particularly troubled by the Committee's action to eliminate the Community Services Administration, transfer only a portion of its program authority to the Department

> of Health and Human Services, and channel what limited funding is provided through the states.

Id. 935, 1981 U.S. Code Cong. & Ad. News at 949.17/

The desire of Congress to establish a new function whereby state entities would be responsible for the operation and implementation of the various grant programs is clear. The legislative history, when coupled with the drastic changes in the new authorities, powers, and responsibilities of OCS can only lead to one conclusion: the category grant function performed by CSA is no longer in existence and the block grant function is a new and distinct function. Moreover, had the Congress intended to continue CSA and its assortment of duties and responsi-

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17/ During consideration of the "Budget Act" the Senate requested an amendment to extend the Economic Opportunity Act but this was rejected.

bilities, it is unlikely that it would have repealed EOA. But the Congress did repeal EOA and substantially modified some activities performed by CSA and clearly eliminated others. The category grant function and all its authorities, powers, and responsibilities now rest with the state entities. Accordingly, we conclude that the ALJ erred in his determination that the "block" grant function transferred to OCS.18/

18/ The ALJ indicated that CSA had in fact authorized a number of "block" grants and expressed the view that the difference between a categorical and block "can be a matter of wording in the funding statement". PID at 10. This conclusion ignores the type of control exercised by CSA over such grants and the fact that by far the majority of grants awarded for CSA were category type grants. The isolated awarding of a block grant for a limited period of time by CSA is insufficient to support the conclusion that the CSA, in the ordinary course of business, performed a block grant function. In fact, the evidence of record is to the contrary.

TRANSITION FUNCTION

The ALJ found that the transition transferred from CSA to OCS. The Budget Act provided that the states could delay the implementation of the provisions of that Act by electing to have OCS directly fund the local community action agencies for fiscal year 1982. CSGA Section 682. We agree with the ALJ's findings in regard to this function. Most of the ingredients of a transfer of function that were lacking in the block grant activity are present in the continuation of the transition grants, at least for the fiscal year 1982. The Budget act specifically provided that the state entities could elect to have OCS continue to administer grant programs in the same manner as CSA. In essence, the law provided OCS for a limited period of time with the same authority, powers and duties as CSA. These

circumstances, when viewed in light of the transfer of function regulations, clearly establish that the transition function is identical to the function that was performed by CSA and therefore the assumption of that function by OCS constituted a transfer of function.

The ALJ also concluded that even in the absence of a transfer of function of the block and transition activities, the CSA competing employees had a right to be employed in a continuing position in OCS. The ALJ based this conclusion on 5 U.S.C. § 3505 (b) which provides:

> When one agency is replaced by another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

The ALJ's interpretation of § 3503 (b) is questionable in light of the se-

quence of events leading up to the abolishment of CSA and the subsequent establishment of OCS. As previously indicated, Congress clearly intended to abolish CSA and expressed the view that OCS was a new agency which had functions distinct from CSA. See pages 9-11, supra. Our finding with respect to the block grant function is consistent with that congressional intent and with the drastic changes that took place with the creation of OCS. The ALJ's application of this provision would require an agency to retain employees who have not been associated with the performance of a function that has been newly created by Congress. Likewise, this position is not consistent with specific provisions of the transfer of function regulations which provide that the employees identified with the performance of a function are entitled to trans-

fer with that function to the gaining agency.

A transfer of function can only occur when a continuing function is moved from one competitive area to another. 5 C.F.R. 351.203 (h)(i). A function is deemed transferred when it disappears or is discontinued at one location and appears in identifiable form at another location. The replacement theory relied on by the ALJ is not applicable in this case because a large segment of CSA's "authorities, powers and duties" have not continued in an identifiable form at a new location. In essence, the major functions performed by CSA were abolished and specific entitlement to compete for positions in OCS is contingent upon a showing by the individual employees that the function with which they were identified has reappeared at OCS.

Accordingly, we find that the ALJ erred in his alternate finding that the employees were entitled to transfer of function rights under 5 U.S.C. § 3503 (b).

This is not say, however, that some individual appellants may not show that the specific function with which they were identified have been transferred, and that they have entitlement under 5 C.F.R. 351.303 to a continuing position at OCS.

Identification

As noted, a transfer of function is "the transfer of the performance of a continuing function from one competitve area and its addition to one or more competitive areas". 5 C.F.R. 351.203 (h)(1). Moreover, 5 U.S.C. § 3503 specifically provides:

> When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the re-

> ceiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.19/

5 C.F.R. § 351.302 (a) provides:

> (a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

Consequently, if the transfer of function requires a reduction in force in the losing agency, the employees identified with the function must be afforded the opportunity to transfer with that function to the gaining agency. Significantly, a losing agency is not obliged to conduct a reduc-

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19/ Conversely, employees in the losing agency identified with the transferred function have no statutory right to remain with the losing agency.

tion in force to accommodate employees who refuse to transfer with their function.20/ A transfer of function may result in the transfer of an entire staff of an organization. However, if the gaining agency discovers that the transfer of function entails the acquisition of more employees than are needed to perform that function, the gaining agency may find it necessary to have a reduction in force. In this situation the incoming employees not only have a right to compete among themselves but also are entitled to compete with other employees already engaged in the performance of that function. Significantly, the gaining agency is to treat

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20/ The logic her is apparent. Since the losing agency no longer has responsibility for the performance of the transferred functions, it should not be required to disrupt its continuing mission by being compelled to have a reduction in force.

those incoming employees as its own for reduction in force purposes. The rights of the incoming employees are protected by merging the retention registers of the segment that is being transferred with the retention registers of the gaining agency. The employees not only compete for retention during the first round of competition, but also have rights of assignment in the second round of competition.21/ To assist agencies in the

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21/ The first round of competition entails the process whereby employees compete within their respective competitive levels. The second round of competition relates to those employees who have been released from their competitive levels and are afforded assignment rights consistent with 5 C.F.R. § 351.703. In this connection it is significant to note that a transfer of function does not require the actual physical transfer of all employees to the gaining agency. Where, as in this case, the gaining agency determines that there will be a surplus of employees, the losing agency may act as

accomplishment of this consistent with the RIF procedures, OPM has promulgated regulations which outline two methods of identifying positions with a transferring function.22/ The regulations envision that the identification of employee will occur prior to the actual transfer of function. There is no dispute that upon invoking the transfer of function procedures, the agency failed to utilize either of the permissible methods of identification. The agency attempts to justify

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agent for the gaining agency in separating those employees who unsuccessfully compete for retention at the gaining agency. See Smith v. Department of Commerce, MSPB Docket No. AT03518210352 (March 1, 1984).

22/ These regulations provide:

§ 351.303 Identification of positions with a transferring function.

(a) the competitive area losing the function is responsible for

its noncompliance by contending that the the identification procedures used were appropriate due to the unique circum-

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identifying the positions of competing employees with the transferring function. Two methods are provided to identify employees with the transferring function:

(1) Identification Method One; and
(2) Identification Method Two

(b) Identification Method One must be used to identify each position to which it is applicable. Identification Method Two is used only to identify positions to which Identitification Method One is not applicable.

(c) Under Identification Method One, a competing employee is identified with a transferring function if:

(1) The employee performs the function during all or a major part of his or her work time; or
(2) Regardless of the amount of time the employee performs the function during his or her work time, the function performed by the employee includes the duties controlling his or her grade or rate of pay.

stances in this situation.23/ In lieu of the required procedures the agency adopted procedures which consisted of considering all former CSA employees as being identified with the functions transferred to OCS. Stipulation 24 (a). The agency then identified all positions in OCS which involved a continuation of a function performed by CSA. Stipulation 24 (c). Fi-

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(d) Under Identification Method Two, competing employees are identified with a transferring function in the inverse order of their retention standing.

23/ The agency contentions regarding the impracticability of utilizing the prescribed methods of identification have little merit. The agency's efforts merely consisted of assigning a personnel specialist a period of two weeks to review the position descriptions of the CSA. In addition, the main purpose of this assignment was not to identify CSA employees with various continuing functions but was to identify functions that were similar to the functions now performed by OCS. Tr. Vol. II 36.

nally, the agency developed master retention registers of competing employees and extended offers of assignment to the highest ranking employee on the appropriate register for each of the designated posiitions.24/

An examination of the record in this case reflects that while the agency attempted to identify the functions that were to continue at OCS, it failed to match those continuing functions with any individual employee who had been identified with that function prior to the transfer. This was error and circumvents the retention preference order established

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24/ A retention register was prepared for the Headquarters and each of the Regional Offices.

by the regulations.25/ As previously noted, in a transfer of function, the operation of the function must cease in one competitive area and be carried on in another competitive area. Therefore, a function is transferred when it disappears in one location and appears in an identifiable form at another location. In contrast, a function which is discontinued does not appear at another location. Em-

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25/ We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. There is ample evidence available in the file concerning the organization and functional activities of CSA. In addition, we note that many of the positions within CSA were identical and located in the same organization. See generally, Hurley v. United States, 575, F.2d 792 (10th Cir. 1977).

In addition, we note it is somewhate paradoxical for the agency to assert adminnistrative impracticability with respect to the identification of CSA employees while asserting that it was successful in identifying the function that continued with OCS. Tr. Vol. II, p 30.

ployees whose positions are liquidated and who are not identified with an operating function specifically authorized at the time of the transfer are not competing employees for positions at the gaining agency. 5 C.F.R. § 351.302 (b). Moreover, the transfer of function regulations contemplate that only those employees whose functions are continuing in the gaining agency (OCS) are entitled to compete for retention. See pages 4-5, Supra.

The proper identification of employees in a transfer of function is vital to the entire scheme established by the regulations, in that the rights of the individual employees for retention are established at this stage. Significantly there is an obligation placed upon the agency to ensure the propriety of the identification process. The agency is required to be particularly sensitive in

identifying employees with a continuing function. Hurley v. United States, 575 F. 2d 792, 797 (10th Cir. 1977). Accordingly, we find that the agency was remiss in meeting the responsibilities and obligations imposed by the regulations. 5 C.F.R. § 351.303.

Our finding regarding the transfer of function, see pages 6-13 supra, is sufficient to establish the agency's intial burden of justifying the need for the reduction in force. Losure v. Interstate Commerce Commission 2 MSPB 361 (1980).26/

26/ In Losure, the Board adopted a three step formulation that is applied in adju- First, the agency has the initial burden of establishing that the RIF action was initiated for appropriate reasons. Second, the appellant has the burden of moving forward by presenting specific exceptions to the action. The third stage calls for the agency to present evidence confirming that the action was effected in accordance with the reduction-in-force regulations.

The focus of the inquiry now moves to the identification process where there primary question is one of retention, i.e., which of the former CSA employees have superior rights of retention with OCS. Our finding of error in the identification process does not permit us under the circumstances in this case to invalidate the entire reduction in force.27/ Although 5 U.S.C. 3502 establishes rights among employees and promotes competition for retention, it does not create an absolute statutory right of continued employment. American Fed. Govt. Emp., AFL-CIO v. Stetson, 460 F.2d 642, 645 (5th Cir. 1981).

27/ CSA employed over 900 individuals and OCS now employees less than 300, many of whom are not associated with the functions that have been transferred to OCS. Under these facts it is apparent that all the employees who were affected by the reduction in force would not have been retained in any event.

Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's noncompliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separation from the federal service in any event. However, the agency is not relieved from its obligation to establish, when raised by an individual appellant, that no infringement of that individual's substantive rights occured. Wilburn v. Department of Transportation, MSPB Docket Number, DC03518210059 (February 23, 1984).

The effects of this agency error as it relates to each appellant have yet to be to determined. Upon remand, each individual appellant must be afforded an

opportunity to present with some degree of specificity, evidence which tends to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. 351.303. Debold v. Department of the Navy, 9 MSPB 95 (1982). It is therefore incumbent upon each appellant to assert that he was identified with a continuing function that is now being performed by OCS. Jackson v. National Transportation Safety Board, MSPB Docket No. DC03518110850, (January 9, 1984). In addition, the appellant must identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer. Jackson, supra, at 4. Once these factors have been established by the appellant, the agency may refute the contentions made or

prove that that appellant's rights have not been abridged by showing that notwithstanding the evidence, the appellant would not, in any event, have been retained. Speaker v. Department of Education, 11 MSPB 430 (1982). Should an individual appellant present evidence that tends to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. 351.303 and the agency is unable or unwilling to refute such evidence by showing it to be untrue or that his retention standing would not have provided such benefit, the appellant would prevail.

28/ The ALJ's determination on the back pay issue was premature. Since there has been no specific finding of an unjustified or unwarranted personnel action, See Crimaldi v. United States, 651 F.2d 151 (2nd Cir. 1981), no back pay may be awarded at this time. However, should any of the appellant's prevail, retroactive restoration will be required by the presiding official.

Accordingly, the individual appeals are now remanded to the respective Regional Offices for processing consistent with this OPINION and ORDER.29/

JUN 18 1984
(Date)

/S/
PAULA A. LATSHAW
ACTING SECRETARY

Washington, D.C.

29/ It is anticipated that during the proceeding below, the agency will provide access to available documents to those appellants seeking to establish a valid claim to a continuing position with OCS.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASSANDRA M. MENOKEN,) Appeal No. 85-861
)
Petitioner)
)
v.)
)
DEPARTMENT OF HEALTH)
HUMAN SERVICES,)
)
Respondent.)

Before FRIEDMAN, BALDWIN, and NEWMAN, Circuit Judges.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/S/
Francis X. Gindhart, Clerk

4/28/86
Date

cc: Ms. Cassandra M. Menoken
Ms. Mary Mitchelson, DOJ

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASSANDRA M. MENOKEN,) Appeal No. 85-861
)
Petitioner,)
)
v.)
)
DEPARTMENT OF HEALTH)
AND HUMAN SERVICES,)
)
Respondent.)

Before FRIEDMAN, BALDWIN, and NEWMAN, Circuit Juidges.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby, is denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/S/
Francis X. Gindhart, Clerk

4/11/86
Date

cc: Ms. Cassandra M. Menoken
Ms. Mary Mitchelson, DOJ

Supreme Court, U.S.
FILED
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No. 86-93

In the Supreme Court of the United States

OCTOBER TERM, 1986

CASSANDRA M. MENOKEN, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that she was wrongfully separated from the Community Services Administration when that agency was abolished by statute in 1981. The decision below is correct, it does not conflict with any decision of this Court or of any other court of appeals, and it presents no significant legal question. Accordingly, review by this Court is not warranted.

1. a. Prior to September 30, 1981, the Community Services Administration (CSA) was responsible for administering federal anti-poverty program grants to community agencies. The Omnibus Budget Reconcilation Act of 198[illegible] (OBRA), Pub. L. No. 97-35, 95 Stat. 357 *et seq.*, however, eliminated the CSA and created the Office of Community Services (OCS), a new agency within the Department of Health and Human Services (HHS), to administer the

block-grant program created by OBRA (Pet. App. A3, C3-C6). Unlike the CSA, which had more than 900 employees, the OCS had only 165 employees to carry out its functions (Pet. App. A4).

After OBRA was signed into law, the CSA notified its employees that all positions at the agency would be abolished, that no reassignments were available, and that all employees would be separated by September 30, 1981. Shortly before that date, however, the United States District Court for the District of Columbia ruled that, under the Veterans Preference Act, 5 U.S.C. 3502-3503, HHS was required to reassign CSA employees to the OCS insofar as the CSA's functions were transferred to that agency. *National Council of CSA Locals* v. *Schweiker*, 526 F. Supp. 861 (D.D.C. 1981). HHS then offered the 165 positions that existed in the newly created OCS to those former CSA employees with the highest retention standing based upon preference order master lists. HHS created these lists because the CSA had not maintained adequate personnel records, a fact that prevented HHS from reconstructing exact reduction-in-force priority registers for CSA employees (Pet. App. A4-A5, C7-C12).

Former CSA employees not selected under this procedure appealed to the MSPB, claiming that they were unlawfully separated from the CSA and that they were entitled to be reinstated with back pay to positions with the OCS until the OCS properly carried out its own reduction-in-force. The MSPB agreed that HHS had not followed correct procedures for determining which former CSA employees should be transferred to the OCS, but it concluded that this failure did not invalidate the entire reduction-in-force. Rather, the MSPB held that the appropriate remedy was to allow each former CSA employee to prove that he or she was entitled to a position with the OCS (Pet. App. D1-D43).

The former CSA employees appealed to the United States Court of Appeals for the Federal Circuit, which upheld the MSPB's decision. *Certain Former CSA Employees* v. *Department of Health and Human Services*, 762 F.2d 978 (1985) (Pet. App. C1-C41). The court of appeals agreed that HHS's use of the master retention lists was not in accordance with governing regulations, but it held that HHS nonetheless had afforded the former CSA employees all of the rights to which they were entitled under the Veterans Preference Act (Pet. App. C23-C24). The court concluded that any possible errors in the reassignment process could be corrected by the procedure that the MSPB had adopted: that is, to afford an opportunity to each former CSA employee, including petitioner, to show that he or she was entitled to an OCS position that had been erroneously assigned to another former CSA employee (*id.* at C30).

b. Petitioner was separated from her position as a GS-14 attorney-advisor with CSA when that agency was abolished on September 30, 1981 (Pet. App. B4). She appealed her separation to the MSPB, claiming that she was entitled to employment with the OCS (*id.* at A1-A2). The MSPB issued a decision sustaining petitioner's separation (*id.* at B1-B10). Petitioner appealed to the Federal Circuit, and her appeal was stayed pending that court's resolution of *Certain Former CSA Employees*, which involved common issues of law (*id.* at A8). After that case had been resolved, the court of appeals affirmed the MSPB's decision in the instant case, ruling that petitioner had not established that she was entitled to a position in the OCS (*id.* at A11-A18; 784 F.2d 365).

2. a. Petitioner reiterates her contention (Pet. 10-18) that she was entitled to one of several positions in OCS. That fact-bound claim does not warrant review by this Court. In any event, her claim was properly rejected by the court of appeals.

Petitioner was not entitled to compete for any of the three OCS attorney-advisor positions at the GS-15 level, because an employee is not entitled to be promoted during a reduction-in-force, such as this one (Pet. App. A13). *Mello* v. *Department of Energy*, 20 M.S.P.B.R. 45, 46-47 (1984). Thus, petitioner's argument (Pet. 15) that she was "qualified" for all the attorney-advisor positions at OCS is irrelevant with regard to positions above her GS-14 level, as the court of appeals found (Pet. App. A12-A13). Nor may petitioner argue (Pet. 15) that her former CSA position should have been classified at grade GS-15. As the court of appeals explained (Pet. App. A14), the MSPB necessarily had to rely on the civil service classifications in effect at the CSA when the reduction-in-force took place, since it would be nearly impossible to determine the retention rights of employees affected by a reduction-in-force if every employee's civil service classification had to be reexamined. Although there was one OCS attorney-advisor position at the GS-14 level, petitioner was not entitled to it, because it was awarded to another former CSA employee who had greater retention rights than petitioner (*id.* at A15).[1] The remaining OCS positions to which petitioner claims an entitlement were occupied by two Justice Department investigators detailed to the OCS. Petitioner was not entitled to compete for those positions because they were positions of record with the Department of Justice, not with the OCS. See 5 C.F.R. 351.404(a)(3).[2]

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[1]The person selected for the GS-14 slot was in a higher retention group and had an earlier service computation date than petitioner (Pet. App. A15).

[2]Petitioner clearly was not entitled to compete for any HHS position outside of the OCS. The parties stipulated, and the court of appeals found (Pet. App. A17), that the CSA's functions were transferred only to the OCS. The OCS therefore was the continuing competitive area in which petitioner could compete for retention. See 5 C.F.R. 351.302.

b. Petitioner errs in contending (Pet. 18-21) that the court of appeals' decision conflicts with *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). As the Federal Circuit explained in *Certain Former CSA Employees*, "[t]he present case is far removed from *Vitarelli*" (Pet. App. C27). There, a single employee was discharged, on the ground that he was a security risk, in violation of the agency's procedures, and this Court held that he should be reinstated. 359 U.S. at 539-546. The instant case, by contrast, involved a reduction-in-force in which more than 900 former CSA employees sought reinstatement with a new agency that had only 165 positions to fill. Obviously, only a small percentage of CSA's employees could be employed by the OCS. Thus, unlike the situation in *Vitarelli*, most of the former CSA employees would have lost their positions regardless of how the reduction-in-force was carried out. For that reason, the remedy adopted by the MSPB—namely, to allow each former CSA employee to show that he or she was entitled to a position with the OCS, rather than to invalidate the entire reduction-in-force—was "a reasonable method of dealing with perhaps a unique and certainly a most unusual situation," a remedy that "fairly and appropriately adjusted and accommodated" the respective interests of the former CSA employees and the government (Pet. App. C35). Petitioner's argument in essence is that she and more than 700 other individuals whose jobs no longer existed should receive a back pay award from the Treasury for a five-year period during which they did no work and during which it was impossible for them to do any work. The court of appeals correctly rejected that argument.

It is therefore respectfully submitted that the petition for a writ of certiorari should be dénied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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No. 86-93

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CASSANDRA M. MENOKEN
Attorney at Law and
Pro Se Petitioner

215 Seaton Pl., N.E.
Washington, D.C. 20002
(202) 269-3465

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REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner herein replies to respondent's memorandum in opposition to her petition seeking review of the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in the above captioned matter. Respondent essentially argues, in its memorandum, that the

petition should be denied for the following reasons:

1. It is impossible to ascertain petitioner's retention rights in connection with the 1981 reduction in force.

2. Petitioner failed to prove that she was "entitled" to a promotion.

3. The case at bar is 'far removed' from Vitarelli v. Seaton, 359 U.S. 535 (1959).

Petitioner herein contends that:

1. Respondent's claims of "impossibility" have been rejected by the Merit Systems Protection Board (Board) and the Federal Circuit and they should likewise be rejected by this Court.

2. Petitioner's entitlement to a promotion is a spurious issue which was not raised by respondent until after the Board's decision in this matter.

3. There is no factual or legal justification for the Federal Circuit's failure to follow the holding in Vitarelli, supra.

A. Respondent's Failure To Properly Determine Petitioner's Retention Rights

In setting forth the "factual" foundation for its argument against granting this petition, respondent attempts to justify its failure to properly determine petitioner's retention standing in 1981 by stating that it was "prevented from reconstructing exact reduction in force priority registers for CSA employees" because of the inadequacy of the personnel records maintained at CSA. Resp. 2. Respondent neglects to point out, however, that its claim of impossibility was expressly rejected by both the Board and the Federal Circuit. The Federal Circuit, in a decision which preceded the one at issue here, wrote:

> In directing [the remand] procedure the Board rejected the department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined ...
>
> Although the petitioner's challenge the factual basis for [the Board's] findings, we conclude that they are supported by substantial evidence ...

Certain Former CSA Employees v. Department of Health and Human Services, 762, F.2d 978, 985 (1985); Pet. App. C31-C32. petitioner urges the Court not to be swayed by respondent's persistent claims that it was impossible to establish proper retention priorities -- particularly when the record reflects that, when given a second opportunity to do so at petitioner's hearing, respondent made no attempt whatsoever to rectify its error. The Federal Circuit's decision in the case at bar ex-

cuses respondent's conduct in this regard. Pet. App. A19-A20. For reasons that are not explained, the lower court in the instant case, departed radically from its decision in the prior related matter. That decision upheld the remand procedure as a mechanism for properly determining the retention rights of former CSA employees who were challenging their terminations. Id. at 985; Pet. App. C34. Petitioner contends that the Federal Circuit's opinion in the case at bar should be reviewed with particular scrutiny in view of its unusual and unexplained failure to follow the findings set forth in Certain Former CSA Employees. Id.

B. Petitioner's Entitlement to a Promotion

Respondent's memorandum urges the Court to accept the Federal Circuit's finding that petitioner's claim has no merit because she failed to establish that she was entitled to a promotion. Resp. 3. Herein lies another example of the lower court's changing of the rules in the middle of the game. The nature of petitioner's burden in the remand hearings, as described by the Board, and upheld by the Federal Circuit, was as follows:

> [To] assert that [she] was identified with a continuing function ... Identify a position or positions for which [she] was qualified that have been assigned to other employees with less retention standing or positions occupied by employees with no initial entitlement to transfer. (Emphasis added.)

Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984): Pet. App. D41. Having met all of the above elements through undisputed evidence presented at her hearing, petitioner is now told that she failed to meet her burden because she did not prove entitlement to a promotion. It is significant to note that, at petitioner's hearing, respondent never once asserted that her grade had anything to do with its failure to appoint her to an attorney position. Entitlement to a promotion became an issue, for the first time, when the Board in its decision, sua sponte, added an additional element to petitioner's burden. Thus, instead of petitioner's entitlement to a position being governed

by her qualifications, the Board shifted the entire focus and decided to ignore petitioner's qualifications **altogether.**

The Federal Circuit's discussion of petitioner's qualifications for the attorney positions in the Office of Community Services (OCS) is unintelligible. In essence, it appears to hold that petitioner misconstrued the term "qualifications". Pet. App. A12. However, it is not clear how she misconstrued it. Respondent's own witness established that all CSA attorneys were placed in the same competitive area. Trans. 44-45. Moreover, as previously discussed, petitioner's qualifications for an attorney position were undisputed. It is simply unclear what else the petitioner was required to establish in order to be found qualified for a position in OCS. It is fundamental-

ly unfair and improper for the Federal Circuit to participate in what can only be characterized as a "moving target" approach to this case. It should be noted that there is absolutely nothing in the record to even suggest that grade levels had anything at all to do with respondent's appointment of attorneys in OCS. The evidence indicates (and respondent's own witness virtually admitted) that the attorneys in OCS had been appointed to, and indeed were working in, OCS before position descriptions were even prepared. Trans 65. It is clear that the grade levels assigned to those positions were merely reflective of the grade levels already held by the individuals pre-selec-

ted to fill them. 1/ One of those positions was held by one John Meyers, an individual whose retention rights were clearly inferior to those of petitioner. Pet. 16-17. Neither the decision of the Federal Circuit in the case at bar, nor the respondent's memorandum, cites any authority to support the proposition that an employee's grade level can operate to vitiate rights established under 5 C.F.R. § 351.501 (a)(1) and 502. The one case cited in respondent's memorandum, Mello v. Department of Energy, 20 M.S.P.R. 45 (1984), is clearly inapplicable to the instant matter. The issue in Mello in-

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1/ This was a major issue of fact which was specifically raised by petitioner in the proceedings below. Nevertheless, the Federal Circuit's decision completely fails to address it.

volved an employee's "bumping" rights after he was released from his competitive level in the first round of competition in a reduction in force. Petitioner's claim has nothing to do with the issue of "bumping" rights. Certainly, this petitioner was not required to prove that she was entitled to "bump" John Meyers from his position in OCS because the record reflects that John Meyers should never have been appointed to a position in the first place. There is also nothing in the record to justify respondent's decision to "detail" individuals from other agencies to positions in OCS.

C. The Applicability of Vitarelli v. Seaton

With regard to respondent's contention regarding the applicability of Vitarelli v. Seaton, supra, petitioner respect-

fully defers to this Court the determination of whether the improper termination of hundreds of employees, as opposed to just one, renders this case "far removed" from the principles enunciated in Vitarelli. Even if that were a proper distinction for the Federal Circuit to make in the consolidated proceedings below, that rationale could not apply here, because, in the case at bar, the issue is the improper termination of one employee.

Respondent argues that "most of the former CSA employees would have lost their positions regardless of how the reduction in force was carried out." Resp. 5. This may well be true. However, this blanket assertion fails to carry respondent's burden of showing that this petitioner would not have survived a properly implemented reduction in force -- and it

certainly does not excuse its failure to even try to make such a showing when given the opportunity in petitioner's remand hearing.

For the foregoing reasons, petitioner again urges review of this matter.

Respectfully submitted,

Cassandra M. Menoken

CASSANDRA M. MENOKEN
Attorney at Law and
Pro Se Petitioner

215 Seaton PL, N.E.
Washington, D.C. 20002

(202) 269-3465